NOT DESIGNATED FOR PUBLICATION

DIVISION IV

ARKANSAS COURT OF APPEALS

No. CA 07-715

HIGHLINES CONSTRUCTION CO., INC., APPELLANT, VS. CARROLL ELECTRIC COOPERATIVE CORP., ET AL., APPELLEES,	**Opinion Delivered** FEBRUARY 13, 2008 APPEAL FROM THE CARROLL COUNTY CIRCUIT COURT, [NO. CV-2004-86], HON. ALAN D. EPLEY, JUDGE, AFFIRMED ON DIRECT APPEAL; REVERSED AND REMANDED ON CROSS-APPEAL

JOHN MAUZY PITTMAN, Chief Judge

Appellant Highlines Construction Co., Inc., contracted to perform work on power lines for appellee Carroll Electric Cooperative Corp. in November 2001. Carroll Electric requested Highlines to do additional work on the project. Highlines did the work and subsequently sued Carroll alleging that it (Highlines) had not been adequately compensated and that Carroll had been unjustly enriched. After a bench trial, the trial judge held that the doctrine of unjust enrichment was inapplicable because there was a contract between the parties governing the payment to be received for the work. On appeal, Highlines argues that the trial court erred in ruling that there was a contract between the parties because the type of work being performed at the relevant time was different than the type of work Highlines

had agreed to perform under the contract. On cross-appeal, appellees argue that the trial court erred in concluding that it was not authorized to award them attorney's fees. We affirm on appeal and reverse and remand on cross-appeal.

The applicable law was discussed at length in *Coleman's Service Center v. FDIC*, 55 Ark. App. 275, 935 S.W.2d 289 (1996):

> To find unjust enrichment, a party must have received something of value, to which he was not entitled and which he must restore. *Dews v. Halliburton Indus., Inc.,* 288 Ark. 532, 536, 708 S.W.2d 67 (1986). The basis for recovery under this theory is the benefit that the party has received, and it is restitutionary in nature. *Id*. at 536-37. The doctrine of unjust enrichment had its origins in the action for money had and received, which was based upon the theory that there was an implied promise to pay. *Frigillana v. Frigillana*, 266 Ark. 296, 307, 584 S.W.2d 30 (1979).
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> One who is free from fault cannot be held to be unjustly enriched, however, merely because one has chosen to exercise a legal or contractual right. *Guaranty Nat'l Ins. Co. v. Denver Roller, Inc*., 313 Ark. 128, 138, 854 S.W.2d 312 (1993). One is not unjustly enriched by receipt of that to which he is legally entitled. *Smith v. Whitener*, 42 Ark. App. 225, 228, 856 S.W.2d 328 (1993). It is generally held that, where there is an express contract, the law will not imply a quasi- or constructive contract. *Lowell Perkins Agency, Inc. v. Jacobs*, 250 Ark. 952, 959, 469 S.W.2d 89 (1971); *Friends of Children, Inc. v. Marcus*, 46 Ark. App. 57, 61, 876 S.W.2d 603 (1994). It has been held that the quasi-contractual principle of unjust enrichment does not apply to an agreement deliberately entered into by the parties. *Lowell Perkins Agency, Inc. v. Jacobs*, 250 Ark. at 959. "[T]he law never accommodates a party with an implied contract when he has made a specific one on the same subject matter." *Id.* In *Moeller v. Theis Realty, Inc*., 13 Ark. App. 266, 268-69, 683 S.W.2d 239 (1985), we stated that the concept of unjust enrichment has no application when an express written contract exists.

Coleman' Service Center, 55 Ark. App. at 299, 935 S.W.2d at 302.

Here, appellant's argument fails because there was in fact a written contract between the parties with respect to the additional work. Appellant correctly notes that the contract

was for line-extension work and specifically excluded the conversion-assembly work that appellant later performed as additional work. However, the contract expressly contemplated and provided for such additional work in Article I, Section 2, which provided:

> **Additional Projects.** *From time to time the Owner and the Contractor may enter into negotiations for the performance of work at labor prices which may differ from those in the Proposal (such work being hereinafter called "Additional Projects"). Except as may otherwise be agreed upon in writing by the Owner and the Contractor at the time the supplemental contract for the Additional Project is negotiated, the provisions of the Contract for the Project shall apply.*

Appellant was not required to perform any additional projects for appellee but, having done so, it was bound by the terms of the parties' agreement. Furthermore, the agreement expressly provided in Article I, Section 3, that "[i]f kinds of Construction Units for which prices are not established in this Proposal are necessary for the construction of the Project, the prices of such additional Units shall be as agreed upon in writing by the Owner and the Contractor prior to the time of installation." Consequently, pursuant to the express terms of the parties' agreement, additional work was to be paid for at the same rate originally established in the contract in the absence of a prior written agreement to the contrary. Appellant was paid for the additional work at the rate established in the contract and, having failed to secure a written agreement for an increased rate of compensation prior to undertaking this work, will not be heard to say that the contractual rate was inequitable.

On cross-appeal, appellees argue that the trial court erred in ruling that it was not authorized to grant appellees attorney's fees because the action was based on quantum meruit rather than contract. They are correct. In *City of Fort Smith v. Driggers*, 305 Ark. 409, 808

S.W.2d 748 (1991), the supreme court held that recovery could be had for attorney's fees where the underlying recovery was for "labor or services" on the basis of quantum meruit regardless whether a contract was shown. Here, the action was to recover for the alleged value of labor and services on the basis of quantum meruit, and the trial court was in fact authorized to award attorney's fees under *Driggers*. Whether or not the trial court chose to do so would be a matter within its discretion. Under similar circumstances we have remanded for the trial court to exercise its discretion. *See Vereen v. Hargrove*, 80 Ark. App. 385, 96 S.W.3d 762 (2003). We do so in this case as well.

Affirmed on direct appeal; reversed and remanded on cross-appeal.

GLOVER and MILLER, JJ., agree.